

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

To Be Argued By WILLIAM SONENSHINE, ESQ.

ORIGINAL

DOCKET NO. 76-1173

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

JAMIE CASTRO-TIRADO,

Appellant.

On Appeal from the United States District
Court for the Eastern District of New York

BRIEF AND APPENDIX ON BEHALF
OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76 CR 1173

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMIE CASTRO-TIRADO

Appellant.

BRIEF ON BEHALF OF APPELLANT

STATEMENT OF THE CASE

Appellant, JAMIE CASTRO-TIRADO, was indicted in the United States District Court for the Eastern District of New York under indictment number 75 Cr. 811.

The indictment contained one count charging appellant with Possession, with intent to distribute a quantity of cocaine in violation of Title 21 United States Code, Section 841 (a)(1).

A pre-trial motion by the appellant to suppress the drugs seized was held on January 13, 1976, before the Hon. John R. Bartels, a Judge of the United States District Court, Eastern District of New York. The motion was denied by Judge Bartels in a memorandum-decision and order dated January 26, 1976. Thereafter on February 3, 1976 prior to trial, the appellant

entered a guilty plea to the one count indictment.

On March 26, 1976 the appellant was sentenced by the Hon. John R. Bartels to a term of imprisonment of four and one half (4 1/2) years, subject to Title 18 United States Code, Section 4208 (a)(2) with a special parole term of three (3) years.

The appellant is incarcerated at this time pursuant to the sentence imposed by Mr. Justice Bartels.

STATEMENT OF FACTS

THOMAS FLOOD, testified that he is employed by the United States Immigration and Naturalization Service as a criminal investigator and that on October 23, 1975 he was working at Kennedy Airport checking to see if any illegal aliens were entering the country (8)*.

While stationed at the TWA terminal, he observed two men who looked Hispanic departing flight 16 which had arrived from Los Angeles and Phoenix (9 - 10). He followed them and overheard them conversing in Spanish (17) at which time he stopped them and asked if they spoke English (18) and received a negative reply (19). Castro upon questioning stated, he was from Columbia (19), that he entered the country two weeks ago with a passport and a one month visa but that he did not have the documents with him at that time. The investigator then placed the defendant under arrest (20).

Agent Flood testified on cross-examination that the actual arrest took place at approximately 6:40 A.M. at which time he frisked the defendant and found a plane ticket with a luggage claim check (43). Agent Mulkearns retrieved a suitcase with the claimcheck (51).

LAWRENCE MULKEARNs, testified that he is an investigator for the Immigration and Naturalization Service and that on October 23, 1975 he was checking the arriving passengers on flight 16 to determine if any illegal aliens were entering the city (89).

*Numerical references in parenthesis refer to pages of the minutes of the motion to suppress.

Agent Flood spoke with the defendant and thereafter arrested him (91).

He further testified that the defendant gave him his ticket upon request (92), at which time he gave the defendant a printed card which contained his "constitutional" rights in Spanish (96). The defendant read the card and stated he understood it (98).

The Agents and their prisoners then proceeded to the baggage area. He retrieved a suitcase bearing the corresponding claimcheck to that found with the defendant's ticket which also bore an i.d. tag with the name J. Castro on it (99).

The defendant informed him his passport was home, in Jackson Heights, so they went there to retrieve it, but could not find it (101-102). They then proceeded to a travel agency where the defendant thought his passport might be, but it was closed, so they proceeded to Immigration Headquarters (102). After the defendant was placed in a cell, Agent Mulkears went to his vehicle, retrieved the suitcase, brought it to the defendant and told him to open it (104), at which time he did (107).

After the suitcase was opened Agent Mulkearns searched it and found plastic bags containing a white powder (108).

On cross-examination the agent testified that he arrived at his headquarters at approximately 9:35 A.M. at which time he was determined to look into the suitcase (113-114). The agent stated that he always opens the luggage of detained aliens and that if the defendant had not opened it,

he would have tried to open it himself (114). The sole purpose for opening the suitcase was to determine if there were any weapons inside and not to look for contraband (115).

The defendant, upon being advised of his rights a second time at 10:45 A.M., stated that he wanted to speak to an attorney first (118). Agent Mulkearns then stated upon questioning by the Court that every alien who is detained has his luggage searched (127), because once sent to detention facilities he has access to the luggage, therefore a check must be made for weapons.

GEORGE REGAN, testified that he is an investigator for the United States Immigration and Naturalization Service and that on October 23, 1975 he met the defendant about 10:15 A.M. at headquarters (132-133). He was not present when the suitcase in question was opened, but did state that he knew it was opened prior to that time (133-134). After showing the defendant a card containing "Miranda" warnings in Spanish, he asked the defendant to sign it but was advised that he would not until he spoke to an attorney (134-135).

The agent then conversed with the defendant because he had not requested an attorney to be present or did not affirmatively state he did not want to speak to an attorney (135). Upon being questioned by the Court, the agent admitted that the defendant stated "I won't answer questions until I spoke to my attorney first" (137). Thereafter the defendant related to the agent the story as to why he had the contraband after again being advised that he did not have to make a statement (140-145).

POINT

THE SEARCH OF THE
APPELLANT'S SUITCASE
AND SUBSEQUENT SEIZURE
OF CONTRABAND THEREIN
WAS ILLEGAL, THUS VIOLA-
TING THE APPELLANT'S
CONSTITUTIONAL RIGHTS

While it is conceded at this time, as it was during the pre-trial motion to suppress, that the government agents made a lawful arrest (152, 159), it is submitted that the warrantless search of the defendant's suitcase was illegal.

In United States v. Coll, 357 F. Supp. 333 (U. S. D. C., Puerto Rico, 1973) the defendant was stopped by Immigration officials when he was about to board a flight in San Juan which was flying to New York. An inspection of the defendant's documents revealed certain problems whereupon he was taken into custody as an alien illegally in the United States. The defendant in that case was in possession of three Eastern Airlines luggage claims checks but upon questioning, denied any knowledge of said claim checks or the luggage. The authorities thereupon sent for the luggage which corresponded to the claim checks, found in the defendant's possession. When the luggage in question arrived it was opened to determine its ownership in view of the fact that the defendant denied that it was his. Upon opening the luggage, one hundred three pounds of marijuana was found inside it. The Court in that case stated at page 336:

".... therefore the only validity that
defendant's claim might have, is that

"since the search of the luggage was after his arrest, a warrant should have been obtained. This would be so if defendant had accepted the luggage as his. But in the instant case, defendant at all times denied ownership of said baggage. Therefore, the search was not the type prohibited by the Fourth Amendment." (emphasis added)

In the instant case it is not disputed that the defendant was arrested prior to the search nor is it contended that the officer sought and obtained a warrant to search the suitcase.

While it is recognized that in Abel v. United States, 362, U. S. 217, 80 S.Ct. 683, 4 L. Ed. 2d 668 (1960), the Supreme Court recognized the right of Immigration officers to arrest and search aliens who are illegally in this country, the Court did hold at pages 236-7:

"It is to be remembered that an I.N.S. officer may not arrest and search on his own. Application for a warrant must be made to an independent responsible officer, the District Director of the I.N.S., to whom a prima facie case of deportability must be shown."

The cases which sustain searches in situations such as this deal with searches based upon probable cause or reasonable suspicion that contraband may be found or that documents establishing the alien status of a defendant may be found but such may be seized only in the course of a lawful search. In the instant case, there is no testimony that the officer believed there was contraband in the suitcase or that he was seeking to locate documents of the defendant. (see also Gouled v. United States, 255 U.S. 298, 65 L. Ed. 674, 41 S. Ct. 261; Marron v. United States, 275 U.S. 192, 72 L. Ed. 231, 48 S. Ct. 74; Almeida-Sanchez v. United States, 413 U.S. 266, 37 L. Ed. 2d 596, 93 S. Ct. 2535).

The trial Court in sustaining the search did so on the theory that it was conducted as an inventory search and thus not violative of the defendant's constitutional rights. The Court in support of its decision cited numerous cases such as Cady v. Dombrowski, 413 U.S. 433, 441-448 (1973). It must be noted that in that case the police had reason to believe that the vehicle which was searched might contain a weapon and therefore, the search was conducted to determine if one did in fact exist. In the case at bar, there was no reason to believe that there was a weapon or contraband in the suitcase (115), thus distinguishing it. The agents testified that when an alien is removed to detention pens prior to deportation, his luggage is searched because the alien would have access to it and therefore a determination had to be made as to whether or not any form of weapon was carried therein.

This "policy" is nothing more than a convenient way of avoiding the requirement of probable cause or the necessity of obtaining a search warrant, and thus should be held unconstitutional.

In situations such as the present one, where the alien has family living locally, the suitcase with the alien's consent could have been turned over to them and they could have delivered whatever necessities the alien required to keep himself prior to deportation.

In Harris v. United States, 390 U. S. 234, another case cited by the trial court in support of its decision to sustain the search a vehicle observed leaving the scene of a robbery was seized as evidence and searched pursuant to police department regulations. The suitcase in the instant matter was not seized as evidence, nor did the arresting agents have any reason to believe it was used in the commission of a crime and they did not search it pursuant to any department regulations but only were following what was characterized as "policy". Admittedly the search in the instant matter was not conducted to determine if the detainee was legally in the country (Abel v. United States, supra) and therefore does not fall within the rational of those cases which sustained searches on that ground.

The United States Supreme Court recently reaffirmed its position that warrantless post arrest searches are illegal when it sustained a search in United States v. Edwards, 415, U. S. 800 39 L. Ed. 2d. 771, 94, S. Ct. 1234 (1974) and stated at page 1239 footnote 9:

"Holding the Warrant Clause inapplicable in the circumstances present here, does not leave law enforcement officials to no restraints. This type of police conduct 'must [still] be tested by the Fourth Amendment's general proscription against unreasonable search and seizures.' Terry v. Ohio, 392 U. S. 1, 20 88 S.Ct. 1868, 1879 20 L. Ed. 2d 889 (1969)."

In that case a defendant's clothing was seized the morning after his arrest, when the police had probable cause to believe that the clothing the defendant wore was material evidence of the crime for which he had been arrested. Once again, the instant case lacks any testimony establishing that the officer felt that the contents of the suitcase would contain evidence material to the defendant's anticipated deportation.

*Further, it cannot be claimed that the suitcase was searched out of a fear that the defendant could open it and destroy evidence or retrieve a weapon from it. From the time the authorities came into possession of the suitcase until it was opened, which consisted of a considerable time period,, the defendant never was in physical possession

of the suitcase or had access to it.

It is evident from considering the evidence presented during the hearing that the Constitutional Rights of the defendant were violated by the Immigration officers. To permit the arbitrary intrusions into the privacy of an individual such as was done in this matter violates the most fundamental rights that the Courts have been attempting to protect throughout the years.

CONCLUSION

THE MOTION TO SUPPRESS
SHOULD BE GRANTED AND
THE INDICTMENT DISMISSED

Respectfully submitted
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A P P E N D I X

DIRECT EXAMINATION

BY MR. CORCORAN:

Q Mr. Flood, by whom are you employed, sir?

A United States Immigration and Naturalization Service.

Q How long have you been with Immigration?

A A little over two years.

Q In what capacity are you employed?

A Criminal investigator.

Q What are your duties as a criminal investigator?

A My main duty is to apprehend illegal aliens in the United States.

Q Are you assigned a particular post?

A For the past year I have been assigned to Kennedy Airport investigating.

Q What are your duties at Kennedy Airport?

A Our duties are to examine flights coming in from Los Angeles and the border and check to see if there are any illegal aliens.

Q Were you working at Kennedy Airport on October 23, 1975?

A Yes, I was.

Q Calling your attention to approximately

1
2 6:30 o'clock a.m. that morning, what were you doing?

3 A We were examining flight No. 16 at TWA Term-
4 inal coming from Los Angeles and Phoenix.

5 Q Were you alone?

6 A No. I was with Investigator Mulkerns,
7 Pangia and Levinski.

8 THE COURT: Give their last names.

9 THE WITNESS: Mulkerns, m-u-l-k-e-r-n-s.

10 Pangia --

11 THE COURT: That is his last name?

12 THE WITNESS: Yes, sir.

13 And Levinski, L-e-v-i-n-s-k-i.

14 Q Where were you stationed at that time, sir?

15 A At that time I was at the end of the tunnel
16 as it leads from the plane to the main lobby of TWA.

17 Q Were you able to observe all who exited Flight
18 16 at 6:30 a.m. that morning?

19 A Yes.

20 Q Who was stationed with you?

21 A Mulkerns.

22 Q Where was Investigator Pangia and Levinski?

23 A They were stationed right at the gate where
24 the plane comes in.

25 Q What if anything did you observe at 6:30
o'clock a.m. on October 23, 1975?

1
2 A I observed two men of Hispanic origin --

3 MR. EVSEROFF: Move to strike that as a con-
4 clusion, your Honor.

5 THE COURT: Oh, no. You mean by that, they
6 looked Hispanic?

7 THE WITNESS: Yes, sir.

8 A (Cont'g) -- walking rather rapidly, compared
9 to the rest of the people of the flight, down the tunnel
10 where the plane comes in to the main lobby, and then to
11 the baggage claim area.

12 Q What, if anything, were those two individuals
13 doing?

14 A They both appeared nervous.

15 MR. EVSEROFF: Move to strike that.

16 THE COURT: No. Overruled.

17 A (Cont'g) One of them had a cut, glasses, and
18 one of them identified as William Ramos.

19 THE COURT: How long have you been in that
20 position?

21 THE WITNESS: As criminal investigator?

22 THE COURT: Yes.

23 THE WITNESS: Two years and two months.

24 THE COURT: And you have had experience in
25 observing and watching the passengers as they get

1
2 he glanced away again, and then he glanced away again. Then
3 I became suspicious that he was possibly an illegal alien.
4 I walked behind him and the other gentleman. I followed
5 them for approximately ten yards. I heard them conversing
6 in Spanish.

7 Q Are you, yourself, fluent in Spanish, Agent
8 Flood?

9 A I'm able to talk to a person in Spanish and
10 understand what they say.

11 Q Will you tell the Court what training you have
12 had in the Spanish language?

13 A I have had three years of Spanish in high
14 school, one year in college, one year in the Immigration
15 Service, and I have been speaking Spanish on the job quite
16 frequently.

17 Q And you had determined that the language spoken
18 was Spanish?

19 A Yes.

20 Q Were you able to detect anything of the con-
21 versation?

22 A The only word I can distinctly remember was
23 "Maleta."

24 Q That would be Spanish for what?

25 A Suitcase or baggage.

Q What, if anything, did you do at that time?

A I then stopped in front of the two gentlemen and asked them if they knew English.

MR. EVSEROFF: Who spoke?

THE COURT: Who spoke?

THE WITNESS: Jaime Castro.

Q What did you do at that point, sir?

A I stepped in front of the two gentlemen and asked them if they spoke English. I asked in English. They replied, "No." I then identified myself as an officer of the Immigration and Naturalization Service, and in Spanish.

Q Had you reached any conclusion based upon your observations, sir?

A Yes. I suspected they were illegal aliens.

MR. EVSEROFF: Your Honor, I move to strike that.

MR. CORCORAN: Your Honor, since the basis of the action is important in this hearing, I think his state of mind and his conclusions are relevant.

THE COURT: Well, the question is both subjective and objective, and the objective, I think, was since they were walking fast, that one of them glanced and he had eye contact with him, then glanced away -- that was Tirado?

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2 THE WITNESS: Yes, sir.

3 THE COURT: They were speaking in Spanish
4 and the word "suitcase" was mentioned. But the
5 fact of the word suitcase being mentioned doesn't
6 mean that --

7 MR. CORCORAN: May I suggest that under the
8 United States Supreme Court decision, it's the
9 agent's experience as a criminal investigator that
10 is the determining factor in arresting.

11 THE COURT: All right. I will let it in.
12 You suspected they were both illegal aliens?

13 THE WITNESS: Yes, sir.

14 THE COURT: They spoke Spanish and didn't
15 understand English.

16 Q What, if anything, did you say to the defend-
17 ant after you advised him that you were arresting him?

18 A I asked him what country he was from.

19 Q In Spanish or English?

20 A In Spanish. He answered me in English -- no,
21 Colombia. I asked the other gentleman what country he was
22 from. He answered me "Colombia."

23 THE COURT: That was Ramos?

24 THE WITNESS: Yes, sir.

25 Q Did you have any further conversation wi

1
2 the defendant at that time?

3 A Yes. At that point, Investigator Mulkerns
4 came over to me. He took with him Nieto-Ramos a few feet
5 away to speak to him, and I continued speaking to Jaime
6 Castro.

7 Q What, if anything, did you say to him and
8 he to you?

9 A I asked him when was the last time he entered
10 the United States. He replied that he had entered the
11 United States approximately two weeks before. I asked him,
12 What color if any kind of papers did he have with him when
13 he entered the United States. He said he had a passport
14 and a visa.

15 I asked him, for how long was he admitted to
16 be in the United States as a visitor.

17 He said, one month.

18 At that point I asked him for his passport or
19 for his I-94. That is the passport. He told me that he
20 did not have it with him at that time.

21 Q What, if anything, did you find at that point?

22 A I then told him he was under arrest.

23 MR. CORCORAN: Thank you. I have no further
24 questions of this witness at this time, your Honor.

25 THE COURT: All right.

1
2 THE COURT: Couldn't imagine him having a
3 suitcase so soon.

4 MR. EVSEROFF: Unless he had a hand bag.

5 Q Is this the suitcase that is the subject of
6 this case, if you know (indicating)?

7 A Yes, it is.

8 Q Now, when he was placed under arrest, did you
9 search him?

10 A I gave him a quick pat down, yes, to make sure
11 he had no concealed weapons.

12 Q Did you find any contraband?

13 A No.

14 Q Did you find a ticket?

15 A Yes.

16 Q How did you know he had one? Did you see it?

17 A Yes. I could see it. I looked in there.

18 Q Did you see a luggage claimcheck?

19 A Subsequently, I did.

20 Q What time did you see the luggage claimcheck?

21 A I'd say approximately seven minutes later.

22 Q And at that time did you see the ticket also,
23 the plane ticket?

24 A Yes, I did.

25 Q Now, you knew, as a result of seeing the plane

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A Yes, he was.

Q Now, --

A He was handcuffed to the other gentleman.

Q Now, when you got down the tunnel with Mulkearns and Castro, did Mulkearns retrieve the suitcase in your presence?

A Yes, sir. He did.

Q After that, is it a fact --

THE COURT: Did he retrieve two cases or one?

THE WITNESS: One suitcase.

THE COURT: But you saw two claim checks there?

THE WITNESS: The first claim check was for a bag going from New York to Phoenix. I don't know if it was the same bag that went from New York to Phoenix.

THE COURT: That is from New York to Phoenix?

You were not interested in that. Very well, proceed.

RECROSS-EXAMINATION (CONTINUING)

BY MR. EVSEROFF:

Q After the bag was retrieved by Mulkearns, yourself and Castro, all of you went down the carousel and you then went someplace; is that right?

A I then -- yes, sir.

Q You went with Mr. Castro; is that right?

A No, sir.

a 1/9

BY MR. CORCORAN:

Q Are you assigned to any particular place?

A I am assigned -- I am assigned to the area control section, and I am in the airport squad.

Q Were you working on October 23rd, 1975?

A Yes.

Q Calling your attention to approximately 6:30 that morning, where were you, sir?

A I was in the TWA arrivals terminal.

Q For what purpose?

A To check the flights from Los Angeles for possible illegal aliens.

Q What flight was that?

A At the time, TWA flight 16.

Q Were you with anyone else, sir?

A Yes.

Q Who was that?

A Investigator Thomas Flood.

Q Did you have occasion at approximately 6:30 on the morning of the 23rd, to encounter the defendant, Jaime Castro?

A Yes.

Q Where did you encounter him, sir?

A That is the gentleman.

1
2 THE WITNESS: Yes, sir. They were walking to-
3 gether and talking to each other.

4 Q Did you subsequently have a conversation with
5 Mr. Castro?

6 A Yes.

7 Q What was that, sir?

8 A Mr. Flood determined that Mr. Castro was going
9 to be coming with us. I spoke to Mr. Nieto-Ramos.

10 THE COURT: Wait a minute. Mr. Flood determined
11 what?

12 THE WITNESS: That Mr. Castro was going to be
13 coming with us.

14 THE COURT: Wait a minute.

15 THE WITNESS: He was going to be coming with us.

16 THE COURT: We don't know if that's an arrest
17 or what it means.

18 I didn't understand that. Did you understand
19 that?

20 MR. EVSEROFF: I thought he said Mr. Flood
21 arrested him.

22 THE COURT: All right. Then I understand.

23 BY MR. CORCORAN:

24 Q Mr. Castro was under arrest?

25 A Yes.

THE COURT: What you are saying is Flood arrested Castro; is that right?

THE WITNESS: Yes.

THE COURT: But you didn't arrest anyone?

THE WITNESS: Yes, I did, your Honor.

THE COURT: You were with him.

Q Who did you arrest?

A Mr. Nieto-Ramos.

Q Mr. Castro's companion?

A Yes.

THE COURT: Was this done simultaneous?

THE WITNESS: Yes.

THE COURT: That means they were both coming with you?

THE WITNESS: Yes.

THE COURT: Coming with you -- well, I will keep that in mind.

Q What, if anything, occurred after the arrest?

A I cuffed Mr. Castro to Mr. Nieto-Ramos. Investigator Flood walked away, and I asked Mr. Castro did he have a ticket? He gave me a ticket.

THE COURT: Wait a minute. You asked Mr. Castro for what ticket?

THE WITNESS: The ticket he used to come from

1
2 A Yes, the flight.

3 THE COURT: Then he had a boarding pass to
4 Phoenix.

5 I thought he already come back from Phoenix.

6 MR. CORCORAN: That's correct.

7 THE COURT: And he had one, I suppose. I don't
8 know, from Phoenix to New York boarding pass. You
9 don't have that there?

10 THE WITNESS: There is no boarding pass from
11 Phoenix to New York.

12 THE COURT: All right.

13 BY MR. CORCORAN:

14 Q What, if anything, occurred after you obtained
15 these documents from the defendant, Mr. Castro?

16 A After I obtained them, I gave Mr. Castro a
17 copy of his rights in Spanish and told him to read them.

18 Q Do you have the document that contains such
19 rights with you today?

20 A Yes, I do.

21 (Handing.)

22 MR. CORCORAN: May we have this marked Govern-
23 ment's Exhibit 6.

24 THE CLERK: Government's Exhibit 6, rights card,
25 marked for identification.

1
2 A After the rights were given to the defendant,
3 investigator Flood walked down to where I was standing in the
4 terminal with Mr. Castro, and Nieto-Ramos, and we proceeded
5 towards the baggage carousel, the pick-up area for
6 baggage.

7 Q Did you make any inquiry of Mr. Castro if he
8 had baggage?

9 A He did.

10 Q Who did?

11 A Mr. Flood.

12 Q In your presence?

13 A Yes.

14 Q What occurred?

15 A He asked Mr. Castro if he had luggage.

16 Q Did Castro respond?

17 A Yes.

18 Q What?

19 A He said, "No."

20 Q What occurred then?

21 A I left Investigator Flood, because I was holding
22 the ticket holder from the flight.

23 Q What did you do, sir?

24 A I went over to the bag carousel, and we waited
25 for the piece of baggage with the corresponding number to

1
2 appear.

3 MR. CORCORAN: Mark this.

4 THE CLERK: Government's Exhibit 7, suitcase
5 and contents, marked for identification.

6 Q Agent Mulkearns, will you step down, please
7 and examine Government's Exhibit 7? Have you ever seen that
8 suitcase before, sir?

9 A Yes.

10 Q When did you first see it?

11 A I first saw it in the pick-up area at TWA.

12 THE COURT: Did you get this baggage because it
13 had the same ticket number?

14 THE WITNESS: Yes.

15 The number here corresponds to the same number
16 as the baggage claim.

17 THE COURT: And that baggage claim ticket was
18 taken from Mr. Castro?

19 THE WITNESS: Yes.

20 Q Were there any other identifying marks on that?

21 A A label given by TWA to the luggage, and the
22 name, J. Castro appears.

23 Q After obtaining that bag, what did you do, sir?

24 A I picked up the bag and we then proceeded to
25 the Government vehicle, which was parked outside TWA.

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Q Did Mr. Castro respond?

A Yes, he did.

Q What did he indicate?

A He replied that he had been.

Q What occurred at that point, sir?

A I asked him, "Did he ever receive permission to return to the United States from the Attorney General," and he said to me, "No. I just went to the American Consulate for a visa."

Q After you received that response, what did you do?

A The time we were driving to the American Airlines terminal, we just proceeded to the American Airlines terminal.

Q Will you tell the Court what occurred after that?

A After that I asked Mr. Castro where his passport was, and he replied that it was home.

He had it with his wife in Jackson Heights.

(Continued on next page.)

2 BY MR. CORCORAN:

3 Q Did you, in effect, go to the home?

4 A Yes.

5 Q Did you obtain the passport there?

6 A No, we didn't.

7 Q What happened, after that?

8 A Mr. Castro informed me at the residence
9 that his passsport was at a travel agency in Roosevelt Avenue.
10 We proceeded there at that time.

11 Q Were you able to obtain his passport there?

12 A No, we were not. The travel agency was closed.

13 Q Did you then take them to 20 West Broadway,
14 the Immigration Headquarters?

15 A Yes.

16 Q What occurred then, sir?

17 A We parked the car and my partner and myself
18 took Mr. Castro and Mr. Nieto-Ramos to the 13th Floor, to the
19 investigations branch, and he was placed in a holding pen
20 we have for aliens.

21 Q Was Mr. Castro arrested at that time?

22 A Yes.

23 THE COURT: Was Ramos with him?

24 THE WITNESS: Yes.

25 Q Where weere you located at that time?

1
2 Brooklyn Navy Yard?

3 A Yes.

4 Q Was Mr. Castro taken to the Brooklyn Navy Yard?

5 A No.

6 Q Why not?

7 MR. EVSEROFF: Your Honor, I object to this.

8 What is the relevance.

9 THE COURT: I will take it.

10 Q Will you tell the Court what occurred at 20
11 West Broadway, Agent Mulkearns?

12 A Yes.

13 I returned to the service vehicle where I had
14 left the suitcase in the trunk of the vehicle. I took the
15 suitcase back to the 13th floor and walked to the holding
16 pen where Mr. Castro was sitting.

17 At that time and point, I put the suitcase on
18 the desk, and asked Mr. Castro to open the suitcase.

19 THE COURT: Wait a minute. All you have done
20 is marked a lot of exhibits for identification.
21 You have introduced nothing in evidence yet.

22 MR. CORCORAN: I understand that.

23 THE COURT: All right. He is identified that
24 suitcase. Now he can't unless you put it in evidence.

25 Q What would have become of that suitcase had

1 really. I can decide whether it's irrelevant.

2 MR. EVSEROFF: I will withdraw it.

3 THE COURT: I don't see offhand what would have
4 happened.

5 MR. CORCORAN: Your Honor, since the possible
6 cause to find the cocaine in the suitcase --

7 THE COURT: The problem is whether he had an
8 improper arrest. If you had one, what would have
9 happened there after, etc., etc. It seems to me it
10 is not going to get you anywhere.

11 Now, your real key is did you have a proper
12 arrest. You have luggage, all right.

13 Q Do detained illegal aliens have access to their
14 baggage at the Brooklyn Navy Yard?

15 A Yes.

16 Q What happened when you proceeded to 20 West
17 Broadway?

18 A I asked him to open the suitcase.

19 Q What happened then?

20 A He worked the combination and opened the suit-
21 case for me.

22 Q Would you step down and open the suitcase?
23 Would you examine the suitcase, please? The contents thereof.
24 Are the contents of that bag familiar to you, sir?
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A Yes.

Q Have you seen those clothes before?

A Yes.

Q Did you have occasion to search that bag at 20 West Broadway on October 23, 1975?

A Yes.

Q Approximately what time was that, sir?

A It was a little bit after 9:45 in the morning.

Q What if anything --

THE COURT: Wait a minute. I thought you didn't find a passport until 12:00. You examined the, this before you got there.

All right. You examined the contents of the bag. What about it?

THE WITNESS: I looked around inside the suitcase, your Honor, and I was looking for any weapon or any type -- anything that might have been dangerous in the suitcase.

There was a pair of pants laying on the top of the clothes. There was a lump. At that point I picked the pants off, and it unravelled. At that point a plastic bag filled with powder dropped out of the suitcase.

Q Do you have those plastic bags with you today?

1 A About 6:40 in the morning.

2 Q Well, when you got back -- incidentally, there
3 came a time when you recovered his passport and the card that
4 they gave you when you come into this country -- I forgot the
5 number, what do you call that?

6 A Form I-94.

7 Q Form 494, I think?

8 A It's Immigration Form I-94.

9 Q Now, what time of the day of the arrest was this
10 recovered?

11 A Sometime in the afternoon.

12 Q About 12:00 o'clock or so, would you say?

13 A I believe it was later than that.

14 Q Was it brought to your office?

15 A Yes, sir.

16 Q Who brought it; his wife?

17 A No. A young Colombian girl.

18 Q When you checked out the form, the passport and
19 the form, the I-94, it was as he told you he had it; was it?

20 A He never told me how long he came in for, no.

21 Q I see. Now, what time did you get back to your
22 office in Manhattan?

23 A Approximately 9:35, 9:40 in the morning.

24 Q And it was then that you were determined that you
25

1
2 wanted to look into that suitcase?

3 A Yes.

4 Q And you told us the reason that you wanted to
5 look in the suitcase was to see if there was any weapon in
6 there?

7 A Yes.

8 Q Do you always look in a suitcase of an alien
9 who has been detained?

10 A Yes.

11 Q That is standard operating procedure?

12 A Yes.

13 Q And you asked Mr. Castro to open the suitcase
14 and he opened it for you?

15 A Yes.

16 Q And he was in the detention pen, I think you
17 called it?

18 A A holding pen.

19 Q Holding pen. And of course, if he hadn't opened
20 it at your request you would have opened it anyway; wouldn't
21 you?

22 A I would have tried to have opened it, yes.

23 Q He was in custody, still?

24 A Yes.

25 THE COURT: And you can consider having it

1
2 opened by the Immigration officers?

3 THE WITNESS: Yes.

4 THE COURT: And you said you opened it because
5 you wanted to see if there was a weapon in it?

6 THE WITNESS: Yes.

7 THE COURT: Did you open it?

8 THE WITNESS: To see if there was anything
9 potentially --

10 THE COURT: Not to see if there was any
11 contraband in it?

12 THE WITNESS: No.

13 Q After you opened it and found the package with
14 the white powder in it, Government's Exhibit 7A, this package,
15 what time was it when you found what you say?

16 A It was after 9:45. Between 9:45 and 10:00 o'clock.

17 Q About 10:00 o'clock, would you say?

18 A Slightly before, yes.

19 Q After you found it, did you question
20 Mr. Castro at that time?

21 A I did not.

22 Q Did you call the Drug Enforcement Agency?

23 A Yes.

24 Q And nobody questioned Mr. Castro until they got
25 there; is that right?

MR. CORCORAN: These were given to the defendant two different times. Subsequently, he was given this card and initialled the form.

Q The stamp of this is the same?

A Yes.

Q With respect to the one that's been introduced as Defendant's Exhibit 1 in evidence, the form indicates that the subject refused to sign and wants to speak with an attorney first; is that right?

A Yes, I believe so.

Q That is the one at 10:15 A.M.

A Yes.

Q And did he tell you that also when you spoke to him?

A He said nothing.

Q He said nothing?

A Jus that he understood this rights.

Q These two other Government exhibits, 3500-6 and 3500-7, these affidavits --

THE COURT: Affidavits? There are some affidavits in exhibits?

MR. CORCORAN: I will interpose an objection at this time. They are not affidavits of this witness.

THE COURT: No, you can refresh his recollection.

1
2 THE WITNESS: Yes, your Honor. If he is
3 detained.

4 THE COURT: Why can't you find out whether a
5 man is illegally in the country without searching
6 his baggage?

7 THE WITNESS: Because if the detention facility
8 in Brooklyn -- we have had experiences of trouble
9 with rights of this sort, and it's required by the
10 investigations branch that before you turn an alien
11 over to the deportation and detention branch, we know
12 everything in his suitcase.

13 THE COURT: So he takes his suitcase with him?

14 THE WITNESS: Yes, sir. He has access to change
15 his clothes while he is being detained by us.

16 THE COURT: What is the reason for searching?

17 THE WITNESS: It is to prevent any potentially
18 dangerous weapons.

19 THE COURT: That would be true if you didn't
20 send him to the detention facility. Suppose you had
21 your detention facility right next to your office.

22 THE WITNESS: At one time it was on the four-
23 teenth floor of our office, and we served on the
24 thirteenth floor before anything was taken to the
25 fourteenth floor.

3
1 THE COURT: You mean the illegal reentry.

2 MR. CORCORAN: That's right. Upon his own
3 admission.

4 THE COURT: Let's see. All right, let's see,
5 Mr. Regan.

6 (Whereupon, Agent Mulkearns was excused from
7 the stand.)

8 G E O R G E R E G A N , having been first duly sworn by
9 the Clerk of the Court, was examined and testified as
10 follows:

11 THE CLERK: Please take the stand and state your
12 name for the record, and please spell it.

13 THE WITNESS: George Regan, R-e-g-a-n.

14 THE COURT: All right, Mr. Corcoran.

15 DIRECT EXAMINATION

16 BY MR. CORCORAN:

17 Q Mr. Regan, by whom are you employed?

18 A United States Immigration and Naturalization
19 Service.

20 THE COURT: You have got to talk slower.

21 Q How long have you been so employed?

22 A About four years in April.

23 Q In what capacity?

24 A Criminal investigator.

25 Q Were you working on October the 23rd, 1975, sir?

Regan-direct

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2 A Yes, I was.

3 Q Calling your attention to approximately 10:15,
4 10:13 -- well, 10:15 on that morning, did you have occasion to
5 meet the defendant, Jaime Castro?

6 A Yes, I did.

7 Q Do you see him in the Courtroom?

8 A Yes. Sitting in the green jacket.

9 MR. EVSEROFF: Indicating the defendant.

10 Q Where did this meeting take place?

11 A 20 West Broadway in one of the immigrant rooms
12 on the 13th floor.

13 THE COURT: You are going too fast.

14 THE WITNESS: At the Immigration and Naturaliza-
15 tion Service building, 20 West Broadway, 13th floor,
16 in the interview room.

17 Q Was anyone else present besides yourself and
18 Mr. Castro at that time?

19 A Yes, sir. Investigator Nocella.

20 Q Mr. Regan, were you present when the suitcase
21 marked Government's Exhibit 7 was opened at the immigration
22 headquarters?

23 A No, sir, I was not.

24 Q Do you know if that suitcase had been opened
25 prior to your meeting with Mr. Castro?

Regan-direct

5 1

2 A Yes, it had.

3 Q Did you have a conversation with Mr. Castro in
4 the interview room?

5 A Yes, sir.

6 Q What did you say to him and he to you, sir?

7 A Upon entering the interview room I had in my
8 possession a I-214 Immigration form.

9 THE COURT: I-214 at the present time doesn't
10 mean too much to me. Could you tell me what kind of
11 form that is.

12 THE WITNESS: It is the warning as to the rights
13 in Spanish language.

14 THE COURT: You mean it's a Miranda warning.

15 MR. CORCORAN: That's right.

16 Q I show you Defendant's Exhibit A and
17 Government's Exhibit 35007, I believe it's -8, and ask if
18 that's the form you are referring to, sir (handing to
19 witness)?

20 A Yes, it is.

21 Q What did you do with that form upon entering the
22 room?

23 A I asked Mr. Castro if he would read the
24 Spanish, and he said, "Yes."

25 THE COURT: Do you read and speak Spanish?

Regan-direct

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2 THE WITNESS: Yes, sir. I read in Spanish, yes.
3 I asked if he understood his rights. He said he did.
4 I asked him to sign where I indicated. He said at tha
5 time he did not want to sign the form until he first
6 spoke to an attorney.

7 Q Did he say anything further about an attorney?

8 A No.

9 Q Did he ask to have an attorney present at that
10 time?

11 A No.

12 Q Did Mr. Castro indicate that he did not want to
13 speak to you at that time?

14 A No.

15 Q Did you have a conversation with him then?

16 A Yes, sir. After filling out the form and
17 having it witnessed by Mr. Nocella, Mr. Castro began to speak
18 about his family and himself.

19 Q Did you ask him about his family, sir?

20 A I asked him if he had a family in the United
21 States.

22 MR. EVSEROFF: Your Honor, I am goir to
23 respectfully object to the conversation.

24 THE COURT: No. He are going to where it
25 goes.

Regan-direct

what he said.

THE COURT: Does it say that?

MR. EVSEROFF: That's why I objected to it.

MR. CORCORAN: Before he signed the form at that time the agent's testimony --

THE COURT: The agent said -- what did he say to you?

THE WITNESS: I asked the defendant if he would sign the warning of rights and he said, "No. Not until I speak to my attorney first."

THE COURT: Did he say, "I won't answer questions until I spoke to my attorney first"?

THE WITNESS: Yes, sir.

THE COURT: Did you ask him if he understood it.

THE WITNESS: Yes.

THE COURT: What did he say?

THE WITNESS: He said "Yes."

THE COURT: Does it say anyplace that if he wants to stop answering questions he can do so at any time?

THE WITNESS: Yes, sir. The last paragraph.

THE COURT: You mean renunzia (phonetic).

THE WITNESS: No, sir. The one before that.

THE COURT: "If you decide to contest our

1
2 THE COURT: How long are you going to go on this
3 line of questioning? Ramos is not involved.

4 MR. CORCORAN: No, your Honor. A narrative
5 followed in this, which this defendant told the story --

6 THE COURT: Wait a minute. We will go ahead.
7 This is just an introductory. You are not going to
8 proceed along this line whether Ramos is involved here;
9 is that understood?

10 MR. CORCORAN: Yes, sir.

11 Q What, if anything, was said?

12 A I expect "Do you want to tell me about it?"

13 THE COURT: About what?

14 THE WITNESS: I got the impression he was
15 talking about what was going on.

16 THE COURT: He said, "The man in the other room
17 knows nothing about this." What did you say?

18 THE WITNESS: I said, "Do you want to tell me
19 about this?"

20 Q What did Castro say?

21 A He met a man in the street in Jackson Heights.
22 At this point, I reminded the defendant of his right to
23 remain silent.

24 THE COURT: You again reminded him after he
25 began talking?

Regan-direct

2 1
2 THE WITNESS: Yes. His right to remain silent,
3 and his right to have an attorney while we were talking
4 to him, and he said, "No. I will talk about it," and
5 I said, "Do you know the man's name?"

6 And Mr. Castro replied, "I do, but I don't want
7 to tell you because I can get myself killed."

8 He said the man offered him, "\$1,000 to go out
9 to Phoenix, Arizona and to pick up a package for him.
10 The man asked him how he would be dressed, and
11 Mr. Castro replied, "In a blue jacket and pants."

12 THE COURT: You mean the man out in Phoenix?

13 THE WITNESS: No, your Honor. The man -- the
14 unidentified man in Jackson Heights.

15 THE COURT: How about the man in Phoenix?

16 Q It is your testimony, Agent Regan, that the
17 unidentified man in Jackson Heights asked Mr. Castro how he
18 would be dressed?

19 THE COURT: Who is "he"?

20 Q Asked Mr. Castro how Mr. Castro would be
21 dressed when he went to pick up the package.

22 THE COURT: I see.

23 Q What did Castro say to you now?

24 A He said he would be dressed in a blue jacket and
25 white pants, the same outfit he was wearing the day at the

Regan-direct

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2 airport. The man instructed him to go to a motel in Phoenix.
3 I asked Mr. Castro, "Do you remember the name and the address
4 of the motel?"

5 And he said that the name was the Maria Motel,
6 but he did not recall the address. The unidentified man from
7 Jackson Heights told him there would be a bar adjacent to the
8 motel, and he was to go in and wait, and someone would contact
9 him. Mr. Castro said he went to the motel, went to the bar,
10 was sitting there, and a man came in and handed him a bag
11 that resembled a shoe bag from a shoestore, and said, "This
12 is for you."

13 He returned to the motel, back to the airport,
14 where he said he met the other man, Mr. Ramos at the airport.

15 He said Mr. Ramos asked him in Spanish if he
16 could help him buy a ticket to New York, because Mr. Ramos
17 spoke no English. Mr. Castro said, "Yes," and they both came
18 to New York.

19 Q Did Mr. Castro explain to you what he was to
20 do with the package upon his return to New York?

21 A He said the man told him to return to his home
22 and he would be contacted there as to what to do with it.

23 THE COURT: Well, did Mr. Castro tell you that
24 he told this unidentified man what the address of his
25 home was?

Regan-direct

4 1
2 THE WITNESS: No, your Honor. No address was
3 mentioned.

4 THE COURT: Did the unidentified man give such
5 instructions?

6 THE WITNESS: Well, your Honor --

7 THE COURT: You said Mr. Castro was to stay at
8 his home and the unidentified man would return to the
9 home to pick up the bag.

10 THE WITNESS: Your Honor, initially, when
11 Mr. Castro mentioned the unidentified man, he mentioned
12 that he met a man. I asked him for the man's name,
13 and he said he couldn't give it to me because the man
14 would kill him.

15 THE COURT: That is not what I am talking about.
16 The man was told Mr. Castro's address.

17 Q Didn't that indicate, Mr. Regan, that he knew
18 the man?

19 THE COURT: Oh. He knew the man. Unidentified,
20 but not unknown; I see.

21 Q Did Mr. Castro indicate to you at any time
22 during your discussion or in your presence whether or not he
23 knew what was to be in that package?

24 A Yes, sir. Later, he said it was narcotics.

25 THE COURT: Wait a minute. He later said --

Regan-direct

what do you mean? That day, that very moment?

THE WITNESS: No, sir. In the second discussion that I had with him in the presence of two other agents.

THE COURT: The same day?

THE WITNESS: Yes, your Honor. Approximately a half-hour later.

THE COURT: He said he knew that it was narcotics in the bag at the time he picked it up?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

Q Agent Regan --

THE COURT: Of course, that is not an issue here, anyway, whether he knew it or not at the present time. Is that right?

MR. CORCORAN: Correct, your Honor. His admission says.

Q Beyond showing Mr. Castro Defendant's Exhibit A and having him read his rights and again warning him he had the right to remain silent, did you at any point advise Mr. Castro he did not have to speak to you until he had an attorney present?

A Three other times.

THE COURT: Later?

Regan-direct

THE WITNESS: During the course of telling the story.

THE COURT: At what point?

THE WITNESS: I don't recall all the others.

THE COURT: That is the whole story that you told. You say that three times during that, you told him, "You don't have to continue"?

THE WITNESS: There were times, your Honor, when we stopped talking with the instructions and he would start talking about his family after his accident.

Q Would you tell the Court what he told you about his family and accident?

A He told me he had a wife in the United States and he had a child born here in the United States, and his wife was presently trying to get a green card, a permanent legal status, because he had on the birth of his daughter here in the United States.

Q And you also suggested he told you about an accident?

A Yes, sir. He told me that approximately ten years ago he had a motorcycle accident and came back to Columbia Hospital; there were no veins or arteries in his knee, and the circulation was very bad.

Q You were having a general conversation with

1 your Honor.

2 THE COURT: What's that? The motion to suppress?

3 MR. EVSEROFF: Yes.

4 Now, your Honor, if you would hear me for just
5 a few minutes.

6 THE COURT: Yes.

7 MR. EVSEROFF: Your Honor, I think in looking
8 it over, I think that the Government, the agents had
9 a right to make the arrest. I don't contend they are
10 right. In looking at the cases, I think they are
11 right. I do think, however, your Honor, that the
12 search which followed the arrest was not a lawful
13 search, was not a reasonable search subsequent to the
14 arrest. It certainly wasn't based upon probable cause.

15 Your Honor, I would like to read to you very
16 briefly from Abel vs. the United States, before the
17 United States Supreme Court, 1959 case.

18 THE COURT: That was a spy case. Abel was a
19 spy.

20 MR. EVSEROFF: There was some dicta in that
21 case. I would like to call to your attention, they
22 are referring -- the Court is speaking on page 685
23 of --

24 THE COURT: Who's speaking, the majority or
25 the minority?

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1 MR. EVSEROFF: That's right, Judge. That's
2 right. I think what they had to do here to make a
3 search of the suitcase, notwithstanding the reasons
4 given by the agents for the --

5
6 THE COURT: But you admit that the arrest
7 was legal?

8 MR. EVSEROFF: Yes. But I think what was
9 required here is that incident to the arrest and the
10 search of the suitcase, they required a warrant to
11 delivery, because they had no reason, they had no
12 probable cause to search.

13 THE COURT: All right. Now you can talk.

14 MR. CORCORAN: With regard to the last point,
15 that as I indicated earlier, I don't think, your
16 Honor, that a production of the passport or visa
17 at the Immigration headquarters would have any bear-
18 ing upon whether or not the suitcase would be searched.

19 THE COURT: Wait a minute.

20 MR. CORCORAN: As indicated by the agent's
21 testimony, your Honor, in the interim, Mr. Castro
22 was without permission of the Attorney General.

23 THE COURT: You mean he had already offered
24 his admissions and alone they were sufficient?

25 MR. CORCORAN: That was after his arrest and
prior to the search of the suitcase.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- against -

75 CR 811

JAI ME CASTRO-TIRADO,

Defendant.

----- -x

Appearances:

HONORABLE DAVID G. TRAGER
United States Attorney, Eastern District of New York

By: PAUL F. CORCORAN, Esq.
Assistant United States Attorney
Of Counsel

EVSEROFF & SONENSHINE, Esqs.
Attorneys for Defendant

By: JACOB R. EVSEROFF, Esq.
Of Counsel

BARTELS, District Judge

MEMORANDUM-DECISION AND ORDER

Defendant Jaime Castro-Tirado ("Castro"), an illegal alien, was indicted for violation of 21 U.S.C. § 841(a)(1), in that he did knowingly and intentionally possess with intent to distribute approximately one kilogram of cocaine, a Schedule II narcotic drug controlled substance. He now moves to suppress a quantity of cocaine seized by

Immigration and Naturalization Service ([INS]) criminal investigators and certain statements made by him to government authorities. A brief statement of the facts is necessary.

Thomas Flood and Lawrence Mulkearns, INS investigators, while assigned to John F. Kennedy Airport ("JFK") to apprehend aliens illegally present in this country, arrested Castro on October 23, 1975, on his arrival at the Trans-World Airline Terminal at JFK. At the time, Castro was disembarking from Flight No. 16 originating in Los Angeles, California, with a stop at Phoenix, Arizona, where Castro had boarded. Flood testified that from the period of March to October 1975, 500 persons were arrested as illegal aliens arriving on flights from Los Angeles to JFK, 300 of whom were personally arrested by him, and of whom 235 were illegal aliens from Mexico and South American countries. When Castro arrived that day Flood became suspicious of his actions and suspected that he was of Hispanic origin. His suspicion was confirmed when he overheard Castro speak Spanish while exiting from the plane and was told by Castro in response to his inquiry that he was from Colombia. Flood thereupon requested Castro to furnish his passport and his alien registration receipt card for nonimmigrants, Form I-94

(Arrival-Departure Card), required to be kept on his person under 8 U.S.C. § 1304(e), and upon Castro's failure to produce the same, Flood arrested him.

Upon arrest and despite Castro's disclaimer of any baggage, Mulkearns in the course of a search took a baggage check from Castro's person. Both Flood and Mulkearns then retrieved Castro's suitcase at the carousel and took both Castro and the suitcase to INS headquarters, where the suitcase was searched without a warrant, and a quantity of cocaine was discovered therein and seized. At the same time, after Miranda warnings, Castro, upon questioning, made certain admissions. Castro contends that neither the admissions nor the contraband are admissible in evidence.

After argument and briefing, Castro admits, as he must; that he was legally arrested since Flood had reason to believe that Castro was an alien not legally present, 8 U.S.C. § 1357(a)(2), and in addition since Castro failed to have on his person the necessary documents establishing a lawful status in this country. 8 U.S.C. § 1304(e). See United States v. Abrams, 427 F.2d 86, 91 (2d Cir.), cert. denied, 400 U.S. 802 (1970); 8 C.F.R. § 264.1 (1975);

2 Gordon and Rosenfeld, IMMIGRATION LAW AND PROCEDURE
§ 6.10d at 6-79 (Rev. ed. 1975).^{1/}

En route to the INS headquarters Castro admitted to the investigators that he was in this country illegally and was subject to deportation. After the search at the headquarters Castro made certain other inculpatory statements, explaining the presence of the cocaine. He stated that he had, on the instructions of an unidentified man in Jackson Heights, proceeded to Phoenix, Arizona, to a designated motel and bar where he received a plastic bag of white powder, which he knew to be narcotics, from an unknown person who recognized him by his blue jacket and white pants, an agreed upon outfit. According to the plan he was to return to New York, deliver the plastic bag to the unidentified man, and receive \$1,000. Although Castro refused to sign an INS form in Spanish waiving his right against self incrimination and his right to have an attorney present,^{2/} there is no question that after hearing his Miranda warnings given more than once Castro spoke voluntarily without any violation of his constitutional rights.

The crucial question here involved is whether the INS had a legal basis to search the suitcase following the arrest. Although Castro, on the way to headquarters, admitted that he was present illegally in the country, we note that the suitcase was not searched on arrival at 6:30 A.M. but later at headquarters at 10 A.M., which was before Castro's passport and registration card were delivered to INS, and also before Castro made any of the statements sought to be suppressed.

We are reminded by Mr. Justice Frankfurter that deportation proceedings do not warrant the same constitutional safeguards as those required in criminal prosecutions. He stated in Abel v. United States, 362 U.S. 217, 237, rehearing denied, 362 U.S. 984 (1960):

"According to the uniform decisions of this Court deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions. Searches for evidence of crime present situations demanding the greatest, not the least, restraint upon the Government's intrusion into privacy; although its protection is not limited to them, it was at these searches which the Fourth Amendment was primarily directed. We conclude, therefore, that government officers who effect a deportation arrest have a right of incidental search analogous to the search permitted criminal law-enforcement officers."

Here, Castro was arrested for deportation reasons, and the subsequent search was conducted, not to secure evidence of other crimes,^{3/} but to inventory and safeguard the bag's contents against future claims, to discover any dangerous materials^{4/} and to determine whether Castro was entitled to remain in the country. Legitimate caretaking and inventory searches, conducted without a warrant, have been approved by the Supreme Court, Cady v. Dombrowski, 413 U.S. 433, 441-48 (1973); Harris v. United States, 390 U.S. 234, 236 (1968), and ~~was~~^{were} fully articulated in United States v. Lipscomb, 435 F.2d 795, 800 (5th Cir. 1970), cert. denied, 401 U.S. 980, rehearing denied, 402 U.S. 966 (1971), where it was said:

"It can not be denied that to prevent escape, self-injury, or harm to others, the police have a legitimate interest in separating the accused from the property found in his possession. An inventory is then necessary both to preserve the property of the accused while he is in jail and to forestall the possibility that the accused may later claim that some item has not been returned to him."

See also United States v. Edwards, 415 U.S. 800, 804-03 (1974).

Additionally, the INS may properly search the detainee's possessions to determine his legal presence in the country. Abel v. United States, supra, at 235-39, and such a warrantless search may be conducted at the place of detention after a proper arrest. See Edwards v. United States, supra, at 803; Abel v. United States, supra, at 239; United States v. Gardner, 480 F.2d 929, 931 (10th Cir.), cert. denied, 414 U.S. 977 (1973). The INS search and seizure of baggage in the factual context of this case is supported by many authorities.^{5/} See United States v. Grill, 484 F.2d 990, 991-92 (5th Cir. 1973), cert. denied, 416 U.S. 989 (1974) (Warrantless search approved of defendant's suitcase to inventory contents and to determine presence of explosive devices prior to storage for safekeeping); United States v. Mehciz, 437 F.2d 145, 147 (9th Cir.), cert. denied, 402 U.S. 974 (1971) (Warrant not necessary to search suitcase taken from arrestee's possession though he had been handcuffed and suitcase was not then within his immediate control); Piva v. United States, 387 F.2d 609, 610 (1st Cir. 1967) (Search of luggage in apartment for guns approved as attendant upon an arrest of defendants emerging from apartment); Evatt v. United States, 382 F.2d 424, 427 (9th Cir. 1967) (Packsack

in defendant's possession at time of arrest validly seized by the sheriff, and subsequent warrantless search by federal officer approved). Accordingly, we find that the search of Castro's suitcase and the seizure of the cocaine do not violate the mandate of the Fourth Amendment.

Defendant's motion to suppress is denied in all respects. So ORDERED.

Dated: Brooklyn, New York
January 26, 1976

John R. Bartels

U. S. D. J.

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FOOTNOTES

1/

Castro argues that since he informed Flood that both documents were at his home, there was no basis for the arrest. Flood testified, however, that it had been his experience that in 50% of the occasions when such statements were made by illegally present aliens such documents did not exist. It so happened in this case that the documents were delivered to INS, though not until after the government obtained the items here sought to be suppressed.

2/

An INS investigator indicated on the form that "Subject refused to sign wants to spk w/an attorney first".

3/

Indeed, the arresting INS investigators had no suspicion that Castro was involved in any other wrongdoing.

4/

Mulkearns testified that it has long been the established practice of the INS after the apprehension of an illegal alien who is to be detained to search his bags for weapons and other dangerous or destructive material before transferring him to the detention quarters in order to protect not only the agents and law enforcement officers, but also the other detainees, inasmuch as all such detainees are given access to their possessions pending final disposition of their cases.

5/

Castro cites obiter dictum in United States v. Coll, 357 F.Supp. 333, 336 (D. Puerto Rico 1973), for the proposition that a search warrant must be obtained if the defendant acknowledges ownership of the suitcase.

We do not subscribe to this dictum.

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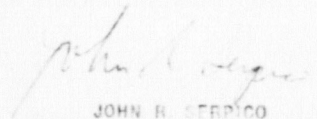
STATE OF NEW YORK)
)ss.:
COUNTY OF KINGS)

Marie Miller being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, New York.

That on the 27th day of May, 1976, deponent served the within Brief and Appendix upon Honorable David G. Trager, United States Attorney for the Eastern District of New York in this action at 225 Cadman Plaza East, Brooklyn, New York the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York

Sworn to before me this
27th day of May, 1976

Marie Miller


JOHN R. SERPICO
Notary Public, State of New York
No. 24-3798170 - New York City Co.
Commission Expires 12/31/77